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No. 88-234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FLORIDA POWER & LIGHT CO., *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA and
U.S. NUCLEAR REGULATORY COMMISSION,

Respondents.

BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON NUCLEAR TECHNOLOGY AND LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Statement of Interest

The Committee on Nuclear Technology and Law (the "Committee") of The Association of the Bar of the City of New York (the "Association"), files this brief as *amicus curiae* with the consent of all parties, urging that the petition for a writ of certiorari be granted.

The Committee is one of the standing committees of the Association, a voluntary bar association with more than 18,000

members. In 1949, the Executive Committee of the Association adopted a resolution establishing a Committee on Atomic Energy, the predecessor to the Committee. That resolution established a mandate for the Committee to report on all matters relating to atomic energy. Since its inception, the Committee has actively participated in the consideration, development and interpretation of much of the proposed legislation and regulation in the field of atomic energy. In the proceedings in this case below before the Court of Appeals for the District of Columbia Circuit, the Committee participated as an *amicus curiae* with the leave of that court.

The decision below involves the constitutional validity of a final rule of the Nuclear Regulatory Commission ("NRC" or the "Commission") permitting the assessment of an annual, *per capita* sum-certain fee against the Commission's commercial reactor licensees amounting to up to one-third (1/3) of the NRC's aggregate annual budget. It presents a case of substantial public importance in the Committee's sphere of responsibility in that it controls in a direct and substantial way the basic manner in which regulation of nuclear power in the United States will be funded. Accordingly, an *amicus curiae* brief is desirable to insure that the important issues at stake are fully developed for the Court's review.

REASONS FOR GRANTING THE WRIT

A. As construed by the Commission, COBRA Section 7601 would comprise an unconstitutional delegation of the taxing power

On September 18, 1986, the NRC issued a final rule imposing on commercial nuclear reactor licensees an annual charge of $950,000 per reactor. 51 Fed. Reg. 33224, *codified at* 10 C.F.R. Part 171 (1987). The Commission's Part 171 regulations did not tailor the annual charge to services requested by particular licensees, nor was it keyed to the benefits inuring to specific licensees. The annual charge also failed to distinguish the benefits to the public associated with the regulation of the commer-

cial application of nuclear technologies. Rather, in construing its authority for the charge under Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), which permitted the NRC to fund up to one-third (1/3) of its annual budget from such charges, the Commission chose to impose a *per capita*, uniform annual fee which includes among its cost bases such items as NRC reactor research programs. The validity of such a charge was subsequently challenged by the petitioners in the court below.

In addressing the issue of unconstitutional delegation of the taxing power, the majority below held that "even if the NRC assessment were characterized as a 'tax' rather than a 'fee,' this delegation would meet constitutional limitations." *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 772 (D.C. Cir. 1988). In so stating, the court disregarded profound issues of constitutional sensitivity to congressional control of taxation and instead resorted to a narrow and cramped interpretation of this Court's rulings in *National Cable Television Ass'n v. U.S.*, 415 U.S. 336 (1974) and *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). The court below also misapplied this Court's prior decision in *Hampton & Co. v. U.S.*, 276 U.S. 394 (1928).

Wholly apart from questions as to the constitutionally permissible outer limits of taxation delegability, it is virtually inconceivable that in enacting COBRA Section 7601, Congress could have thought that it was conferring its exclusive powers to engage in taxation on the Commission. Surely much clearer language would have been adopted by Congress to achieve such a purpose, even if the taxation power were assumed to be delegable. Thus a major concern inherent in the decision below is its sanctioning of a casual delegation of congressional taxing authority.

The language of COBRA Section 7601 gives no evidence that Congress contemplated an unusual delegation of its taxing

authority to the NRC.[1] Rather, COBRA Section 7601(b) directs NRC to:

> "assess and collect annual charges from its licensees . . . except that . . . any such charge . . . shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service."

While the legislative history indicates that COBRA Section 7601 was enacted "to establish a standard separate and distinct from the Commission's existing authority under the [Independent Offices Appropriation Act of 1952]," that standard was designed to effect a distinct and separate fee program and not a tax. As the Congressional Managers of COBRA noted in discussing Section 7601's limitations:

> "This authority is not intended, however, to authorize the Commission to recover any costs that are not reasonably related to the regulatory service provided by the Commission, nor is it intended to authorize the Commission to recover any costs beyond those that, in the judgment of the Commission, fairly reflect the cost to the Commission of providing a regulatory service." *Statement of Managers Re NRC Fees*, 132 Cong. Rec. H879, March 6, 1986 (daily ed.)

This is hardly the language Congress would have used had a delegation of taxing authority been intended. As Judge Starr noted in dissent below, " 'it is . . . wholly inappropriate to

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1 The Committee does not disagree with that portion of the opinion below contending that Congress may legitimately delegate the details of implementation of congressionally authorized taxing authority when it provides sufficient standards and guidance to the agency upon whom such authority is delegated. *See Florida Power & Light Co. v. U.S.*, *supra*, 846 F.2d at 773-76 discussing *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Hampton & Co. v. United States*, 276 U.S. 394 (1928). Clearly, however, no such delegation was intended by Congress here, and NRC has impermissibly appropriated "authority and discretion" over questions of legislative policy.

assume that, without having made its intention express, Congress empowered the NRC to enter into what, at best, must be regarded as a constitutionally unchartered area.' " *See Florida Power & Light Co. v. U.S.*, *supra*, 846 F.2d at 780. Interpretation of this authority as granting anything more than the power to exact a fee for specific services to the specific beneficiaries of the NRC's regulatory efforts would necessarily infer a more purposeful delegation of congressional prerogatives than could have been intended.

Even if Congress could be deemed to have intended to delegate its taxing powers in enacting Section 7601, the essentially unlimited guidance given to the NRC was wholly insufficient to sustain the constitutionality of the delegation. The majority below found adequate standards for delegation in Congress' requirement that the charges be "reasonably related to the regulatory services provided," and that the charges "fairly reflect the cost to the Commission of providing such service." As discussed below, however, the Commission has applied these "standards" in a fashion which does not require any linkage between the charges to particular licensees and the benefit to them of particular services which they have requested. The NRC's rule authorizes the agency itself to fund programs which it initiates, and to make such programs self-sustaining to the extent of 1/3 of their costs.[2] Under COBRA, Congress never set the level of charges the Commission was to collect (stating only that they could be up to 1/3 of its agency's budget), nor specified any formula pursuant to which the NRC was to set the charges. Moreover, the revenue-raising aspects of this 1/3 component are allocated among licensees on a basis which the agency solely determines.

Simultaneously reposing such sweeping revenue-raising powers with a federal agency, together with complete discretion over their manner of imposition, inevitably undermines control over the taxing power. The Constitution, however, clearly intended such functions to be tightly controlled by the demo-

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2 Acting under Section 5601 of the Omnibus Budget Reconciliation Act of 1987, NRC has now increased the self-sustaining share of its budget to 45%. 53 Fed. Reg. 30423 (1988).

cratic process. The NRC's charge removes direct accountability of elected officials over the taxation power and places it with Executive Branch officials, without significant guidance and subject only to minimal procedural controls and judicial restraints. The NRC charge also reduces or even eliminates constitutionally mandated congressional oversight of agency budgets by circumventing normal practice whereby the agency provides justification for its regulatory programs as an integral part of the congressional appropriations process.

In *Mid-America Pipeline Co. v. Dole*, Civ. No. 86-C-815E (N.D. Okla., filed September 4, 1986), *appeal pending sub nom. Burnley v. Mid-America Pipeline Co.*, No. 87-2098, October Term, 1987, a Department of Transportation ("DOT") fee program under Section 7005 of COBRA, similar to the fee program at issue in the instant case, was found unconstitutional by a federal district court. The *Mid-America* court undertook an extensive analysis of *Hampton & Co. v. United States*, *supra*, upon which the Court of Appeals relied in part for its decision below. The court noted that the delegation in *Hampton* was not one of taxing power, but rather a delegation of power to implement a tariff plan fully set out by Congress. Thus in *Hampton*, the delegated powers were merely ministerial in nature and did not give to the "executive office or agency the authority or discretion to determine what the law shall be." *Mid-America Pipeline*, *supra*, at p. 7.

Turning next to an analysis of the DOT's fee statute, the court in *Mid-America* found that Section 7005 of COBRA only authorized the imposition of aggregate fees not to exceed 105 percent of congressional appropriations for pipeline safety program enforcement, and that the only directive given by Congress to DOT for the assessment was that the fee bear a reasonable relationship to usage. *Id.* at 9. The court noted that:

> "[a]lthough the statute prescribes that the amount be 'based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof . . . ,' the fact is that the Secretary *is free to appropriate the cost of regulation in almost any way she*

sees fit. Due to the loose language of the statute, there is a wide-ranging potential impact on the individual pipeline facilities." (emphasis added) *Id.* at 9-10.

Accordingly, the court concluded that Section 7005 of COBRA asked more than aid in implementing a congressionally-established tax. Rather it permitted DOT to "*set* the rate of fees which is in fact a tax, and then go one step further and collect such taxes," in contravention to this Court's holdings in *National Cable* and *New England Power*. *Id.* at 11.

The NRC fees authorized under Section 7601 of COBRA are basically no different than the DOT fees authorized under Section 7005 and held to be unconstitutional. Just as the aggregate DOT fees were required not to exceed 105 percent of aggregate fiscal year appropriations, NRC fees were required not to exceed 33 percent of the Commission's fiscal year costs. Again, just as the DOT fees were to be established by the Secretary of Transportation based on usage, in reasonable relationship to several proposed factors, the NRC fees were to be "reasonably related to the regulatory service provided and . . . fairly reflect the cost" of such service. Indeed Congress gave DOT more specific guidance in setting its fee than NRC was provided in Section 7601. Congress provided no further instruction to NRC on how to set its fees.

Unlike *Hampton*, therefore, this Court is not confronted with an agency's ministerial function in setting fees laid down in detail by Congress. Instead, NRC has assumed discretion in implementing Section 7601. The district court's language in *Mid-America* is thus just as applicable here—"the [NRC] is free to appropriate the cost of regulation in almost any way [it] sees fit . . . [resulting] in a wide-ranging potential impact on the individual [licensees]." *Hampton* and *Mid-America*, therefore, stand in stark contrast to COBRA Section 7601 as applied by NRC here, where Congress has made no specific taxing determinations at all other than imposition of a ceiling equivalent to 1/3 of the agency's overall budget.

B. The Commission's Part 171 charges fail to conform to the constitutional limitations on agency revenue-raising which have been imposed by this Court in analogous circumstances

In the case at bar, the Commission has made the fundamental error of interpreting this Court's prior holdings in such cases as *National Cable* and *New England Power* as merely construing the Independent Offices Appropriation Act of 1952 ("IOAA"), rather than articulating constitutional limitations on taxation flowing from Article I, Section 8 of the Constitution. This Court held in connection with an interpretation of the IOAA that agency fees are constitutional only if they represent "specific charges for specific services to specific individuals or companies." *Federal Power Commission v. New England Power Co., supra*, 415 U.S. at 349; *National Cable Television Association v. United States*, 415 U.S. 336 (1974). Contrary to the majority's decision in the court below, we respectfully submit that the principles established by this Court in interpreting the IOAA transcend any notion of limited applicability to the IOAA alone and apply to COBRA as well.

Article I, Section 8, of the United States Constitution grants to the Congress the non-delegable "power to lay and collect taxes." In both *National Cable* and *New England Power*, the Court held that fees imposed by two federal agencies were in effect taxes, and could not be constitutionally levied by the agencies involved. In *National Cable*, the Court considered the constitutionality of an annual fee established by the Federal Communications Commission ("FCC") to be paid by cable television systems. The fee was challenged on the ground that the FCC was without authority to impose it. The Court first stated that:

> "[t]axation is a legislative function and Congress, which is the sole organ for levying taxes [footnote omitted], may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer. . . . The public agency . . . may exact a fee for a grant which, presumably, bestows a bene-

fit on the applicant, not shared by other members of society." 415 U.S. at 340-41.

This Court then noted that the IOAA, the statutory authority for the FCC fee, must be narrowly read to avoid any conflict with constitutional restraints on delegation of power. The Court explained that although an agency regulates in the public interest, regulated parties may not be required to pay fees that also underwrite services rendered to the public. That is, regulated parties may not constitutionally be compelled to cover all of an agency's costs. *See*, 415 U.S. at 341-42. Thus, in order to guide the FCC in setting fees within constitutional limits, the Court reviewed the language of the IOAA and determined that " 'value to the recipient' is . . . the measure of the authorized fee." 415 U.S. at 342-43. In other words, federal administrative agencies may not constitutionally impose fees that exceed the value of the services to the recipient who is paying them.

In *New England Power*, 415 U.S. 345 (1974), *aff'g* 151 App. D.C. 371, 467 F.2d 425 (D.C. Cir. 1972), this Court was similarly critical of annual fees set by the Federal Power Commission ("FPC"). The FPC had assessed against jurisdictional electric utilities the balance of its annual costs for administering the Federal Power Act after deducting the costs relating to activities in respect of non-jurisdictional companies. The charges were allocated among the utilities based on wholesale sales and interchange of electricity. *See* 415 U.S. at 346-47. The FPC's costs of administering the Natural Gas Act's pipeline programs were allocated on the basis of deliveries in interstate commerce between all natural gas companies with $1 million or more in annual operating revenues. Natural gas producers were also charged for each new reserve certificated at a rate per volume. *See* 415 U.S. at 347-48.

In *New England Power*, the Court of Appeals had held that the agency was not statutorily authorized to impose the charges, and this Court agreed that such fees must be "specific charges for specific services to specific individuals or companies" to avoid a characterization as taxes. 415 U.S. at 349-50. The Court contemplated that such charges would be assessed for specific

services to identifiable recipients, such as the issuance of a license or permit. Such charges would be limited to the costs of providing the service and should not be used as a revenue raising device to maintain or initiate services without special benefit to the fee payer. The Court noted that the FPC's annual charge would have been assessed against every company subject to the agency's rulings even though some "companies . . . had no proceedings before the [FPC] during the year. . . ." 415 U.S. at 351. Thus, the regulated companies would not have been service recipients and would not have received any value for their fee payments. Any fee payments, therefore, would have been in the nature of a tax, which the agency could not impose.

These constitutional constraints imposed on IOAA fees are also applicable to COBRA. In *National Cable*, this Court noted that the grant of taxing power to a federal agency "would be such a sharp break with our traditions [that the IOAA must be read] narrowly as authorizing not a 'tax' but a 'fee'." 415 U.S. at 341.

National Cable and *New England Power* understandably did not promulgate the outer limits of "fee" assessments which could be imposed by agencies without offending constitutional limitations on the taxing power. However, the flat-fee, *per capita* assessments struck down in these cases—the same allocation basis selected by the NRC here—were characterized as taxes by this Court wholly independent of IOAA. In *National Cable* this Court stated unambiguously that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341.

Prior decisions of this Court, other Courts of Appeals, and other panels of the D.C. Circuit have consistently held that a constitutionally permissible fee must satisfy certain standards which the Commission's present regulations disregard. *See, e.g., Central and S. Motor Freight Tariff Association v. U.S.*, 777 F.2d 722 (D.C. Cir. 1985); *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Cir. 1983); *National Cable Television Association v. FCC*, 554 F.2d 1094 (D.C. Cir. 1976); *Electronic Industries Association v. FCC*, 554 F.2d 1109 (D.C. Cir. 1976);

National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135 (D.C. Cir. 1976). These cases contain a common thread of inquiry which must be satisfied to meet constitutional standards:

> "First, the Commission must *justify* the assessment of a fee by a clear statement of the particular service or benefit which it is expected to reimburse. Second, it must calculate the *cost basis* for each fee assessed. This involves (a) an allocation of the specific direct and indirect expenses which form the cost basis for the fee to the smallest practical unit; (b) exclusion of any expenses incurred to serve an independent public interest; and (c) a public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular terms. Finally, the Commission must set a fee calculated to return this cost basis at a *rate* which reasonably reflects the cost of the services performed and value conferred upon the payor." 554 F.2d at 1117, 554 F.2d at 1133 (emphasis in original).

It is abundantly clear that the NRC's charges which are here challenged are indistinguishable from costs that the agency incurs in regulating commercial applications of nuclear technology. It is beyond dispute that this protection of the public from nuclear hazards is the principal mission of the agency under the Atomic Energy Act, and forms the basis for the actual agency expenditures for which recovery is sought under the challenged "fee" scheme.

The court below found no exclusion of public benefit costs was necessary to sustain the validity of the program, stating that "we see no requirement that these generic costs, must be reduced by a portion artificially allocated to public benefit. . . ." *Florida Power & Light Co. v. U.S.*, *supra*, 846 F.2d at 769. Thus the basis of the NRC's regulations is at odds with ample prior authority. Without the partition between public interest costs and costs attributable to specific benefits conferred on licensees, the charges are clearly taxes.

The NRC's revenue raising program similarly offends the requirement that constitutionally permissible fees relate in a specifically identifiable way to costs incurred by the agency in providing services which are requested by particular licensees and benefit them specifically. As this Court noted in *National Cable*:

> "[A] fee is incident to voluntary act, *e.g.* a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 415 U.S at 340.

In the case at bar, the twenty-nine petitioners already have received the necessary consents from the NRC (or its predecessor agency) to engage in the licensed conduct of constructing and operating nuclear facilities. The petitioners already hold licenses which permit the conduct regulated by the NRC, subject only to the NRC's oversight in pursuit of the public interest that each licensee satisfy and comply with the terms and conditions of its license. Regulatory costs associated with obtaining licenses have long since been incurred by the agency and paid for by the individual licensees. Occasions do arise where individual licensees seek amendments to or modifications of their licenses which would allow them to change or alter the means by which they satisfy license requirements. The initiative for the processing of such license changes and the associated provision of regulatory services comes from individual licensees who are the specific beneficiaries of such changes. In such instances there is indeed a specific benefit inuring to specific licenses, thus satisfying constitutional standards.[3] However, the current scheme sweeps the constitutional distinctions of *National Cable* aside by not requiring the recaptured agency costs to be clearly identified with specific requests originating with particular licensees.

In past instances, this Court has granted certiorari because of "the importance of the questions presented and the conflicting

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3 The NRC has long had in place a fee program which captures all of the agency's costs associated with specific license-originating regulatory activities, *see* 10 C.F.R. Part 170.

views in the courts of appeals and the district courts." *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964). *See also Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *Massachusetts v. United States*, 435 U.S. 444 (1978). The conflict between the holding below and the holding in *Mid-America* could not be clearer and is based upon contradictory readings of almost identical statutory authorizations. It is of great importance that this Court provide both federal regulators and regulated parties with a definitive interpretation as to the constitutional limitations of congressionally authorized user fees. The increased and increasing dependence on user fees as a funding method by the federal government demands a clear determination regarding the scope of congressional and agency powers to impose such fees. The imposition and legality of such fees will undoubtedly be presented for judicial review again as Congress seeks alternative means of pursuing its regulatory agenda.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari should be granted.

September 9, 1988

Respectfully submitted,

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